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Gan Boon Aun v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09(H)-26–02 OF 2022
HADHARIAH SYED ISMAIL, GUNALAN MUNIANDY AND AZMAN ABDULLAH JJCA
15 NOVEMBER 2023

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Criminal Procedure — Appeal — Appeal against sentence — Service of notice of appeal — Appellant was found guilty under s 122B(a)(bb) read together with s 122(1) of Securities Industry Act 1983 — Sessions court sentenced appellant to one day imprisonment and fine — High Court judge enhanced imprisonment D *sentence to 24 months in absence of appellant — Whether respondent's notice of appeal was served on appellant — Whether High Court judge contravened s 314(1) of Criminal Procedure Code ('the CPC') in enhancing imprisonment sentence in absence of appellant — Whether High Court's order null, void, illegal and ought to be set aside — Criminal Procedure Code s 314(1) & (2) — Rules of* E *the Court of Appeal 1994 r 105 — Securities Industry Act ss 122(1) & 122B(a)(bb)*

The appellant was charged with an offence of giving a misleading statement to Bursa Malaysia Securities Bhd, an offence under s 122B(a)(bb) read together F with s 122(1) of the Securities Industry Act 1983. At the end of the trial, the sessions court found the appellant guilty of the offence and sentenced him to one day imprisonment and a fine of RM2.5m in default 18 months imprisonment. The appellant had served the imprisonment sentence and paid the fine, but the respondent decided to appeal against the sentence. The High G Court allowed the appeal in the absence of the appellant and increased the imprisonment sentence from one day to 24 months ('the High Court's order'), hence, the present appeal. The respondent raised a preliminary objection that the appeal was incompetent on the ground that the instruction to appeal came from the appellant's daughter and not from the appellant himself, as such, the H counsel acting for the appellant had no locus standi to act in this appeal. The grounds of appeal to be determined by the court were as followed: (a) whether the respondent's notice of appeal was served on the appellant; (b) whether the learned High Court judge had contravened s 314(1) of the Criminal Procedure Code ('the CPC') in enhancing the imprisonment sentence from one day I imprisonment to 24 months in the absence of the appellant; and (c) whether the High Court's order was null, void and illegal and ought to be set aside.

Held, allowing the appeal, setting aside the sentence of 24 months imprisonment imposed by the High Court on 25 January 2022, and restoring

the sentence of one day imprisonment imposed by the sessions court:

(1) The court rejected the preliminary objection. The court opined that there was no law prohibiting a family member of the appellant from giving instruction to a solicitor to file an appeal in a situation where the appellant could not be located. The court's paramount consideration was to determine whether the sentence passed by the High Court was in accordance with the law and that no miscarriage of justice would be caused to the appellant if the appeal was heard on merits. The court should not be concerned with technicalities (see para 13).

(2) In giving effect to the provisions of s 314(1) of the CPC, the court was guided by the decision of the Federal Court in the case of *Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor* [2012] 2 MLJ 8, wherein the Federal Court held 'where the words are clear and unambiguous, a court should give effect to the plain words'. The words used in s 314(1) of the CPC were clear and unambiguous in that the notice of appeal was to be served personally on the appellant. The court could not assume notice was personally served on the appellant just because his solicitors attended case management. In the present case, with the concession made by the deputy public prosecutor, the court found that the notice of appeal was not served personally on the appellant. Further, based on the affidavit evidence of the investigating officer, it was clear that both notice of appeal and notice of hearing were not served to the appellant. Therefore, s 314(1) of the CPC had not been complied with and the service did not constitute proper service in accordance with law. As such, the decision of the High Court judge that the notice of appeal had been served on the appellant was a wrong decision in law and fact (see paras 19–20, 24 & 26).

(3) The court was of the view that even though the court could proceed with the appeal in the absence of the appellant under s 314(2) of the CPC, s 314(2) must be read together with s 314(1) ie, the court was still subject to the limitation 'that the court shall not make any order in the matter of the appeal adverse to or to the prejudice of the respondent'. This had been the consistent approach of the courts in the cases of *Public Prosecutor v Goh Thor Kiah* [1952] 1 MLJ 91b, *Public Prosecutor v Chan Quee Long* [1993] MLJU 263, and *Public Prosecutor v Foo Kim Lai* [2009] 1 MLJ 211, which the High Court in the present case refused to follow. In all the three cases, the court refused to disturb the sentence imposed by the lower court. Instead, the court either adjourned or dismissed the appeal. Had the learned High Court judge followed the three cited cases, he would have had no option but to dismiss the appeal. In this case, the learned High Court judge did not dismiss the appeal. Instead, he enhanced the sentence. It was clear that the new sentence of 24 months imprisonment was severe, adverse to and was prejudicial to the appellant.

The sentence of 24 months imprisonment was a clear violation of s 314(1) of the CPC (see paras 32–33).

(4) It was trite law that courts had no authority to act in contravention of written law and where an order of such a court was made in breach of statute, it was made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose (see *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 ('*Badiaddin*'s case')). Based on *Badiaddin*'s case, the court held that the High Court's order dated 25 January 2022, enhancing the sentence of imprisonment from one day to 24 months was null, void and illegal and ought to be set aside. To prevent injustice, the court exercised the court's inherent powers under r 105 of the Rules of the Court of Appeal 1994 to set aside the High Court's order and restore the sentence imposed by the sessions court (see paras 34 & 40).

[Bahasa Malaysia summary

Perayu dituduh melakukan kesalahan memberikan kenyataan mengelirukan kepada Bursa Malaysia Securities Bhd, satu kesalahan di bawah s 122B(a)(bb) dibaca bersama s 122(1) Akta Perindustrian Sekuriti 1983. Pada akhir perbicaraan, mahkamah sesyen mendapati perayu bersalah atas kesalahan tersebut dan menjatuhkan hukuman penjara sehari dan denda RM2.5 juta jika ingkar 18 bulan penjara. Perayu telah menjalani hukuman penjara dan membayar denda tersebut, tetapi responden memutuskan untuk merayu terhadap hukuman tersebut. Mahkamah Tinggi membenarkan rayuan tanpa kehadiran perayu dan meningkatkan hukuman penjara daripada satu hari kepada 24 bulan ('perintah Mahkamah Tinggi'), justeru, rayuan semasa. Responden membangkitkan bantahan awal bahawa rayuan perayu adalah tidak kompeten atas alasan bahawa arahan untuk merayu datang daripada anak perempuan perayu dan bukan daripada perayu sendiri, oleh itu, peguam yang bertindak bagi perayu tidak mempunyai locus standi untuk bertindak dalam rayuan ini. Alasan-alasan rayuan yang perlu ditentukan oleh mahkamah adalah seperti berikut: (a) sama ada notis rayuan responden telah diserahkan kepada perayu; (b) sama ada hakim Mahkamah Tinggi yang arif telah melanggar s 314(1) Kanun Tatacara Jenayah ('KTJ') dalam meningkatkan hukuman penjara daripada penjara sehari kepada 24 bulan tanpa kehadiran perayu; dan (c) sama ada perintah Mahkamah Tinggi tersebut adalah terbatal, tidak sah dan menyalahi undang-undang serta patut diketepikan.

Diputuskan, membenarkan rayuan, mengenepikan hukuman 24 bulan penjara yang dikenakan oleh Mahkamah Tinggi pada 25 Januari 2022, dan mengembalikan hukuman sehari penjara yang dikenakan oleh mahkamah sesyen:

(1) Mahkamah menolak bantahan awal tersebut. Mahkamah berpendapat tiada undang-undang yang melarang ahli keluarga perayu memberi

arahan kepada peguam cara untuk memfailkan rayuan dalam keadaan perayu tidak dapat dikesan. Pertimbangan utama mahkamah adalah untuk menentukan sama ada hukuman yang dijatuhkan oleh Mahkamah Tinggi adalah mengikut undang-undang dan tiada kegagalan keadilan akan berlaku kepada perayu jika rayuan didengar atas merit. Mahkamah tidak seharusnya mengambil berat tentang pekara teknikal (lihat perenggan 13).

(2) Dalam menguatkuasakan peruntukan s 314(1) KTJ, mahkamah berpandukan keputusan Mahkamah Persekutuan dalam kes *Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor* [2012] 2 MLJ 8, di mana Mahkamah Persekutuan memutuskan 'where the words are clear and unambiguous, a court should give effect to the plain words'. Perkataan yang digunakan dalam s 314(1) KTJ adalah terang dan jelas bahawa notis rayuan hendaklah diserahkan secara kediri kepada perayu. Mahkamah tidak boleh menganggap notis telah diserahkan secara kediri kepada perayu hanya kerana peguam caranya menghadiri pengurusan kes. Dalam kes ini, dengan konsesi yang dibuat oleh timbalan pendakwa raya, mahkamah mendapati bahawa notis rayuan tidak diserahkan secara kediri kepada perayu. Selanjutnya, berdasarkan keterangan afidavit pegawai penyiasat, adalah jelas bahawa kedua-dua notis rayuan dan notis pendengaran tidak diserahkan kepada perayu. Oleh itu, s 314(1) KTJ tidak dipatuhi dan serahan tersebut bukan merupakan serahan yang sepatutnya mengikut undang-undang. Oleh yang demikian, keputusan hakim Mahkamah Tinggi bahawa notis rayuan telah diserahkan kepada perayu adalah keputusan yang salah di sisi undang-undang dan fakta (lihat perenggan 19–20, 24 & 26).

(3) Mahkamah berpendapat walaupun mahkamah boleh meneruskan rayuan tanpa kehadiran perayu di bawah s 314(2) KTJ, s 314(2) mesti dibaca bersama s 314(1) iaitu mahkamah masih tertakluk kepada batasan 'bahawa mahkamah tidak akan membuat apa-apa perintah berkenaan rayuan yang menentang responden itu atau memudaratkannya'. Ini telah menjadi pendekatan konsisten mahkamah-mahkamah dalam kes-kes *Public Prosecutor v Goh Thor Kiah* [1952] 1 MLJ 91b, *Public Prosecutor v Chan Quee Long* [1993] MLJU 263, dan *Public Prosecutor v Foo Kim Lai* [2009] 1 MLJ 211, yang Mahkamah Tinggi enggan ikuti dalam kes semasa. Dalam ketiga-tiga kes tersebut, mahkamah enggan mengganggu hukuman yang dijatuhkan oleh mahkamah rendah. Sebaliknya, mahkamah sama ada menangguhkan atau menolak rayuan. Sekiranya hakim Mahkamah Tinggi yang arif mengikuti ketiga-tiga kes tersebut, beliau tidak mempunyai pilihan selain menolak rayuan tersebut. Dalam kes ini, hakim Mahkamah Tinggi yang arif tidak menolak rayuan tersebut. Sebaliknya, beliau mempertingkatkan hukuman. Jelas sekali bahawa hukuman baharu iaitu penjara 24 bulan adalah berat, menentang dan memudaratkan perayu. Hukuman penjara 24 bulan tersebut adalah

jelas melanggar s 314(1) KTJ (lihat perenggan 32–33).

(4) Adalah menjadi undang-undang yang mantap bahawa mahkamah tidak mempunyai kuasa untuk bertindak bertentangan dengan undang-undang bertulis dan jika perintah mahkamah sedemikian dibuat dengan melanggar statut, ia dibuat tanpa bidang kuasa dan oleh itu boleh diisytiharkan tidak sah dan diketepikan dalam prosiding yang dibawa untuk tujuan tersebut (lihat *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 ('kes *Badiaddin*')). Berdasarkan kes *Badiaddin*, mahkamah memutuskan bahawa perintah Mahkamah Tinggi bertarikh 25 Januari 2022, meningkatkan hukuman pemenjaraan dari satu hari kepada 24 bulan adalah terbatal, tidak sah dan menyalahi undang-undang dan patut diketepikan. Untuk mengelakkan ketidakadilan, mahkamah menjalankan kuasa sedia ada mahkamah di bawah k 105 Kaedah-Kaedah Mahkamah Rayuan 1994 untuk mengenepikan perintah Mahkamah Tinggi dan mengembalikan hukuman yang dijatuhkan oleh mahkamah sesyen (lihat perenggan 34 & 40).]

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (folld)
Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor [2012] 2 MLJ 8; [2012] 1 CLJ 569, FC (folld)
Ishak bin Haji Shaari v PP [2006] 3 MLJ 405, CA (refd)
PP v Foo Kim Lai [2009] 1 MLJ 211, HC (refd)
PP v Chan Quee Long [1993] MLJU 263; [1993] 4 CLJ 262, HC (refd)
PP v Goh Thor Kiah [1952] 1 MLJ 91b (refd)

Legislation referred to

Common Gaming Houses Act 1953 s 4A(a)
Criminal Procedure Code ss 173A, 314, 314(1), (2)
Penal Code s 354
Rules of the Court of Appeal 1994 rr 73, 76, 105
Securities Industry Act 1983 (repealed by Capital Markets and Services Act 2007) ss 122(1), 122B(a)(bb)

Appeal from: Criminal Appeal No WA-42H-10–09 of 2020 (High Court, Kuala Lumpur)

Sithambaram (with Guok Ngek Seong and Lee Wen Rui) (Guok Partnership) for the appellant.
Mohd Hafiz Mohd Yusoff (with Aerie Rahman, Daniel Ariff and Eunice Ong) (Deputy Public Prosecutor, Securities Commission Malaysia) for the respondent.

Hadhariah Syed Ismail JCA:

INTRODUCTION

[1] This is an appeal by Gan Boon Aun against the decision of the High Court dated 25 January 2022 wherein the High Court had allowed the respondent's appeal against the sentence meted out by the sessions court in the absence of the appellant and enhanced the sentence of one day imprisonment imposed by the sessions court against the appellant under s 122B(a)(bb) read together with s 122(1) of the Securities Industry Act 1983 to imprisonment of 24 months and affirmed the sentence of fine in the sum of RM2.5m in default 18 months imprisonment imposed by the sessions court against the appellant.

[2] This appeal raised one important issue, ie, whether the High Court's order dated 25 January 2022 is in contravention of the provisions of s 314(1) of the Criminal Procedure Code and is therefore null, void and illegal and ought to beset aside *ex debito justitae*.

BACKGROUND FACTS

[3] The appellant was charged with an offence of giving a misleading statement to Bursa Malaysia Securities Bhd in Transmile Group Bhd's 'Quarterly Report on Unaudited Consolidated Results for the Financial Year Ended 31 December 2006', an offence under s 122B(a)(bb) read together with s 122(1) of the Securities Industry Act 1983.

[4] The trial commenced at the sessions court on 22 July 2010. At the end of the prosecution's case, the court held that the prosecution had established a prima facie case. The appellant was called upon to enter his defence. However, the defence's case did not proceed promptly as the appellant had filed several applications to challenge the constitutionality of some provisions in the Securities Industry Act 1983. These applications and the appeals arising there from took up almost seven years and were heard at all levels, from the sessions court to the Federal Court.

[5] The defence's case eventually commenced in July 2018. The appellant was the sole witness. On 27 August 2020, the sessions court found the appellant guilty and sentenced him to one day's imprisonment and a fine of RM2.5m in default 18 months imprisonment. He had served the imprisonment sentence and paid the fine.

[6] Both the respondent and the appellant appealed against the decision of the sessions court. The respondent appealed against the sentence of one day imprisonment. The appellant appealed against his conviction and sentence.

[7] Both appeals were fixed to be heard together before High Court judge, Zaini Mazlan J. The case managements for both appeals were fixed on 17 November 2020, 22 December 2020, 2 March 2021, 6 May 2021, 25 May 2021, 15 July 2021, 29 September 2021 and 13 October 2021. However, the appellant's counsel, Dato' Tan Hock Chuan from Messrs Tan Hock Chuan & Co discharged himself for both appeals during the case management on 2 March 2021 on the ground of lack of instructions from the appellant. The appellant did not attend any case management after that, even though the court had issued letters to him to inform of the dates.

[8] The appellant's appeal was fixed for hearing on 13 October 2021. The respondent's appeal was fixed for case management on the same date. The appellant's appeal was struck out as he had failed to attend.

[9] The respondent's appeal was fixed for hearing on 18 October 2021. The appellant was still absent. A warrant of arrest was issued against him. The appeal was adjourned to 13 December 2021. As the police could not execute the arrest warrant on the appellant, the appeal was adjourned to 25 January 2022.

[10] On the date of hearing of the respondent's appeal on 25 January 2022, the appellant or his counsel was not present. The learned deputy public prosecutor ('DPP') informed the learned High Court judge that the warrant of arrest could not be executed. Taking into account the fact that the respondent had attempted to locate the appellant for the past one year, but was unsuccessful, the learned High Court judge decided to proceed with the appeal and ordered enhancement of the sentence of one day imprisonment to 24 months imprisonment.

[11] On 7 February 2022, the appellant filed a notice of appeal against the decision of the High Court in enhancing the one day imprisonment to 24 months' imprisonment.

PRELIMINARY OBJECTION

[12] On 6 January 2023, the respondent gave a notice of preliminary objection that the appeal is incompetent on the ground, that the instruction to appeal came from the appellant's daughter and not from the appellant himself. Hence, the respondent submits that the counsel purportedly acting for the appellant had no locus standi to act in this appeal.

[13] We reject the preliminary objection. In our view, there is no law prohibiting a family member of the appellant from giving instruction to a solicitor to file an appeal in a situation where the appellant could not be

located. Our paramount consideration is to determine whether the sentence passed by the High Court is in accordance with the law and that no miscarriage of justice would be caused to the appellant if the appeal is heard on merits. We should not be concerned with technicalities.

GROUNDS OF APPEAL

[14] In his memorandum of appeal, the appellant raised 13 grounds in support of his appeal. They are as follows:

(a) the learned High Court judge erred in law and in fact when it held that the notice of appeal was 'properly served' on the appellant (where he was the respondent at the High Court);

(b) the learned High Court judge took into consideration irrelevant facts to conclude that the prosecution's notice of appeal had been purportedly served on the appellant;

(c) the learned High Court judge erred in law and/or in fact by taking judicial notice of the comprehensive news coverage of the case that the appellant had knowledge of the prosecution's notice of appeal and had been evasive;

(d) the learned High Court judge erred in fact when he made a finding that the appellant had 'deliberately evaded being notified of the court proceedings' and that he 'is a recalcitrant offender as he evaded service and went into hiding and now absconded' without any evidence and/or any affidavit affirmed by the Investigating Officers and filed by the prosecution to support the same;

(e) the learned High Court judge erred in law and/or in fact when he held that the requirement of service of notice of appeal had been satisfied in accordance with the provision of s 314 of the Criminal Procedure Code. Further, the learned High Court judge failed to appreciate the totality of the facts and/or circumstances of the case as stated above leading to erroneous judgment being given against the appellant;

(f) the learned High Court judge erred in law when he proceeded to hear the prosecution's appeal and subsequently enhanced the imprisonment sentence in the absence of the appellant;

(g) the learned High Court judge erred in law when he failed to take into consideration the relevant laws and/or authorities on s 314 of the Criminal Procedure Code that an appeal cannot proceed in the absence of the appellant (who was the respondent at the High Court) and/or even if it can be proceeded, the High Court 'shall not make any order in the matter of the appeal adverse to or to the prejudice' of the appellant;

(h) the learned High Court judge erred in law and/or in fact when he held that the appellant had chosen to waive his rights to be heard under the principle of *audi alteram partem*;

(i) the learned High Court judge erred in law when he failed to take into consideration that the intention behind s 314 of the Criminal Procedure Code ie the incongruity of sentencing a man without him having the opportunity to be heard is in plain violation of the fundamental principle of *audi alteram partem*;

(j) the learned High Court judge erred in law when he held that he could proceed with the hearing of the prosecution's appeal in the absence of the appellant and to enhance the sentence against the appellant in his absence contrary to s 314 of the Criminal Procedure Code;

(k) the learned High Court judge erred in law and in fact when he took into consideration irrelevant factors in enhancing the imprisonment sentence against the appellant from one day to 24 months including the previous proceedings prior to the trial at the sessions court;

(l) the learned High Court judge erred in law and in fact when he failed to take into consideration the date of the offence and the trend of sentencing in respect of the offence and/or similar offences at that material time; and

(m) in view of the foregoing grounds of appeal, the learned High Court judge erred in law and in fact when he proceeded to hear the prosecution's appeal in the absence of the appellant and enhanced the imprisonment sentence against the appellant from one day to 24 months. And the appellant therefore prays that this honourable court do exercise its supervisory powers and/or ancillary powers under r 73 of the Rules of the Court of Appeal 1994 and/or other laws and/or inherent jurisdiction of this court to set aside the decision of the High Court enhancing the sentence of imprisonment against the appellant from one day to 24 months.

THE ISSUES

[15] Despite there being 13 grounds of appeal, we propose to narrow them to the following three main issues:

(a) whether the respondent's notice of appeal was served on the appellant;

(b) whether the learned High Court judge had contravened s 314(1) of the Criminal Procedure Code in enhancing the imprisonment sentence from one day imprisonment to 24 months in the absence of the appellant; and

(c) whether the order of the High Court dated 25 January 2022 is null, void and illegal and ought to be set aside. A

Whether the respondent's notice of appeal was served on the appellant

[16] The High Court proceeded to hear the respondent's appeal under s 314 of the Criminal Procedure Code which reads as follows: B

> 314 Non-appearance of respondent
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> (1) If, at the hearing of the appeal, the respondent is not present and the Court is not satisfied that the notice of appeal was duly served upon him, then the Court shall not make any order in the matter of the appeal adverse to or to the prejudice of the respondent, but shall adjourn the hearing of the appeal to a future day for his appearance, and shall issue the requisite notice to him for service through the Registrar. C
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> (2) If the service of the last-mentioned notice cannot be effected on the respondent the Court shall proceed to hear the appeal in his absence. D

[17] Before us, the learned deputy public prosecutor ('DPP') conceded that the respondent's notice of appeal was served upon the appellant's previous solicitors, Messrs Tan Hock Chuan & Co. The DPP submitted that service of the notice of appeal on the appellant's previous solicitors, Messrs Tan Hock Chuan & Co is good service based on two grounds. First, s 314(1) of the CPC does not require the notice of appeal to be personally served on the appellant. Second, the appearance of the appellant's previous solicitors at the case managements before the High Court would be sufficient to show that the notice of appeal was duly served upon the appellant. E F

[18] On the other hand, learned counsel for the appellant submitted that s 314(1) of the CPC requires the notice of appeal to be served personally on the appellant (respondent at the High Court) and not on his solicitors. Counsel emphasised the words 'respondent', 'duly served upon him', 'shall issue requisite notice to him' used in s 314(1). It was submitted that nowhere in s 314(1) does it say or indicate that inference can be made that service of the notice to the respondent's solicitors is deemed as service on the respondent. G H

[19] In giving effect to the provisions of s 314(1), we are guided by the decision of the Federal Court in the case of *Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor* [2012] 2 MLJ 8; [2012] 1 CLJ 569, wherein the Federal Court held 'where the words are clear and unambiguous, a court should give effect to the plain words'. I

[20] We agree with the submission of counsel for the appellant that the words used in s 314(1) are clear and unambiguous in that the notice of appeal

is to be served personally on the appellant. In the present case, with the concession made by the DPP, we find the notice of appeal was not served personally on the appellant. Therefore, s 314(1) has not been complied with. Hence, a service does not constitute proper service in accordance with law.

[21] In fact, the non-service of the notice on the appellant is supported by the court's notes of proceedings during case management on 15 July 2021 before the Deputy Registrar. On 15 July 2021, the DPP informed the Deputy Registrar:

> IO telah serah notis kepada Gan Boon Aun, Peguam Tan Hock Chuan telah tarik diri. IO telah buat cubaan serahan sebanyak 6 kali untuk 2 alamat. TPR masih ingin buat usaha lagi untuk buat serahan. TPR mohon kes disebut di hadapan Hakim untuk mohon waran tangkap.

[22] On 18 October 2021, on the date fixed for hearing of the appeal, the learned High Court judge made the following notes:

> Case is fixed for the hearing of appeal. Appellant's counsel stated that they have not been able to effect service on the respondent and that the respondent has been evading service.

[23] We also took note of the affidavits of the Investigating Officer, one Jonathan Chin Ter Yang, affirmed on 11 October 2021; 20 October 2021; 9 December 2021 and 20 January 2022, where he detailed his attempts to serve notice of hearing instead of notice of appeal on the appellant at a few addresses. All these attempts were not successful.

[24] Based on the affidavit evidence of the Investigating Officer, it is clear to us that this is a case where both notice of appeal and notice of hearing were not served on the appellant.

[25] Despite the obvious, in the grounds of judgment, the learned High Court judge held:

> 15. The respondent's counsel had attended the case management on 22 December 2020 and 2 March 2021 for this appeal and his appeal. It is apparent that the respondent had been served with the notice of appeal as his counsel had attended the case management on two occasions, although he had discharged himself on 2 March 2021. Therefore, I agree with the appellant's contention that the notice of appeal has been served on the respondent, satisfying the requirement under s 314 of the CPC. I also took note that the respondent had filed his notice of appeal a day after the prosecution had filed its notice of appeal, which could only mean that he was aware of the prosecution's appeal after being served with the notice of appeal.
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> ...
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> 18. In any event, I opine that s 314(2) of the CPC too had been fulfilled. I also took

judicial notice that there was comprehensive news coverage of this case. It is more probable than not that the respondent had been evasive. Given the strenuous efforts by the appellant, I am satisfied that the service of the notice as required under s 314(2) of the CPC cannot be effected.

...

20. The respondent had deliberately evaded being notified of the court proceedings, considering the many efforts made to trace him. He is a recalcitrant offender as he had evaded service, went into hiding and now absconded. If tolerated, this would only bring disrepute to the court's proceedings. The respondent had chosen to waive his rights to be heard under the principle of *audi alteram partem*.

[26] With respect, we find the learned High Court judge had erred in law and in fact when he held the notice of appeal had been served on the appellant on the basis that his previous solicitors had attended two case managements. In coming to that decision, the learned High Court judge had misunderstood the express provisions of s 314(1) of the CPC which require notice of appeal to be served personally on the appellant. Service of the notice on the appellant and attendance of his solicitors at the case management are two separate and distinct matters. The court cannot assume notice is personally served on the appellant just because his solicitors attended case management. That is not how service is to be effected. The only way the learned High Court judge can satisfy himself that the notice of appeal has been served on the appellant is there must be an affidavit of service affirmed by the Investigating Officer stating he had served the notice of appeal personally on the appellant. Anything short of this will not suffice. In this case, there is no such affidavit before the court. In addition, we also find the learned High Court judge had taken into consideration irrelevant facts, ie, the appellant had waived his right to be heard which led to the wrong decision being made. For the aforesaid reasons, we find his decision that the notice of appeal had been served on the appellant is a wrong decision in law and fact.

Whether the learned high court judge had contravened s 314(1) of the CPC in enhancing the sentence of imprisonment from one day to 24 months

[27] Apparently, at the High Court, learned counsel for the respondent referred to the learned High Court judge the following three cases:

(a) *Public Prosecutor v Goh Thor Kiah* [1952] 1 MLJ 91b;

(b) *Public Prosecutor v Chan Quee Long* [1993] MLJU 263; [1993] 4 CLJ 262; and

(c) *Public Prosecutor v Foo Kim Lai* [2009] 1 MLJ 211.

[28] In *Public Prosecutor v Goh Thor Kiah*, the respondent was charged for possession of opium. He pleaded guilty and was discharged under s 173A of the

CPC. The prosecution appealed against inadequacy of sentence. No notice was served on the respondent. The DPP applied under s 314(2) to proceed with the appeal in the absence of the respondent and suggest a more severe sentence should be passed. Taylor J had this to say:

> It is admitted that his construction is surprising in that it involves the proposition that a person who has been acquitted in one of the lower courts might have his acquittal reversed and a conviction substituted and sentence passed and that he might be arrested and imprisoned without having any further opportunity whatsoever to present his side of the case. Such a construction is a plain violation of the fundamental principle *audi alteram partem* and in my view is wholly opposed to all our principles of judicial procedure.

In *Goh Thor Kiah*'s case, the court did not proceed with the appeal, but adjourned it to another date.

[29] In *Public Prosecutor v Chan Quee Long* [1993] MLJU 263; [1993] 4 CLJ 262, the respondent was charged for an offence under s 4A(a) of the Common Gaming Houses Act 1953. He pleaded guilty and was sentenced to one year imprisonment and fined RM5,000 in default 500 days imprisonment. The respondent served his imprisonment sentence in full. The fine was not paid. The DPP appealed against inadequacy of sentence. The appeal was postponed six times as the notice of appeal could not be served on the respondent. The High Court proceeded to hear the appeal in the absence of the respondent and dismissed the appeal. Abdul Malik Ishak JC (as he then was) took into consideration the limitation that 'the court shall not make any order in the matter of the appeal adverse to or to the prejudice of the absent respondent'.

[30] A similar approach was adopted by Suraya Othman J (as she then was) in *Public Prosecutor v Foo Kim Lai* [2009] 1 MLJ 211. The High Court proceeded to hear the appeal in the absence of the respondent and dismissed the appeal.

[31] However, the learned High Court judge held the above three cases are not applicable because in those cases, notices of appeal were not served on the respondent, whereas, in the case before him, the judge opined notice of appeal was served on the appellant, which we have already ruled to be erroneous.

[32] It appears to us that the learned High Court judge was under the impression that as long as notice of appeal was served on the appellant, even though the appellant was absent, the court can proceed and enhance the sentence. In our view, even though the court can proceed with the appeal in the absence of the appellant under s 314(2) of the CPC, s 314(2) must be read together with s 314(1) ie the court is still subject to the limitation 'that the court shall not make any order in the matter of the appeal adverse to or to the

prejudice of the respondent'. This has been the consistent approach of the courts in the three cases cited above. In all three cases, the court refused to disturb the sentence imposed by the lower court. Instead, the court either adjourned or dismissed the appeal.

[33] Had the learned High Court judge followed the three cited cases, he would have had no option, but to dismiss the appeal. In this case, the learned High Court judge did not dismiss the appeal. Instead, he enhanced the sentence. It goes without saying that the new sentence of 24 months imprisonment is severe, adverse to and is prejudicial to the appellant. The sentence of 24 months imprisonment is a clear violation of s 314(1) of the CPC.

Whether the order of the High Court dated 25 January 2022 in enhancing the sentence is null, void, illegal and liable to be set aside

[34] It is trite law that courts have no authority to act in contravention of written law and where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose: see *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393.

[35] Before us, learned counsel for the appellant moved this court to exercise its ancillary and inherent powers under the Rules of the Court of Appeal 1994 to set aside the order of the High Court and restore the sentence meted by the sessions court.

[36] Rule 76 of the Rules of the Court of Appeal 1994 provides:

> 7 Ancillary powers of the Court
>
> The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.

[37] Rule 105 of the Rules of the Court of Appeal 1994 provides:

> 105 Inherent powers of the Court
>
> For the avoidance of doubt, it is declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[38] In *Ishak bin Haji Shaari v Public Prosecutor* [2006] 3 MLJ 405, the applicant was convicted by the magistrate's court for outraging the modesty of

a 14 year old school girl, an offence under s 354 of the Penal Code. He was sentenced to four yours imprisonment and two strokes of rotan. The applicant appealed against his conviction and sentence to the High Court. The High Court dismissed his appeal on conviction. But, the High Court reduced the term of imprisonment from four years to two years and set aside the sentence of whipping. The applicant applied for leave to appeal to the Court of Appeal. The leave application was dismissed. However, the Court of Appeal opined that the High Court had erred in altering the sentence imposed by the magistrate. The court found that the sentence imposed by the magistrate was not manifestly excessive having regard to the public interest and should not be disturbed. As a result of the High Court's intervention, the court further found a manifest injustice had occurred.

[39] In *Ishak*'s case, the Court of Appeal applied r 76 of the Rules of the Court of Appeal 1994 to set aside the sentence imposed by the High Court and restore the sentence meted out by the magistrate's court. With regard to r 76, Gopal Sri Ram JCA said:

> Rule 76 is a beneficial piece of subsidiary law. It was aimed at doing justice. It is a sweeping provision. The Court of Appeal has the jurisdiction and powers conferred on it by the Federal Constitution and the Act. What r 76 did was to reinforce the Court of Appeal's powers by sweeping into the armoury of powers the Court of Appeal already has, those powers not already mentioned in the Act. As it is a provision whose purpose is the achievement of justice, it must, in accordance with well settled guides to construction be interpreted liberally and not narrowly.

[40] Based on *Badiaddin*'s case, we held that the High Court's order dated 25 January 2022, enhancing the sentence of imprisonment from one day to 24 months to be null, void and illegal and ought to be set aside. To prevent injustice, we exercise our inherent powers under r 105 of the Rules of the Court of Appeal 1994. We allow the appeal and set aside the sentence of 24 months imprisonment imposed by the High Court on 25 January 2022. We restore the sentence of one day imprisonment imposed by the sessions court.

Appeal allowed; sentence of 24 months imprisonment imposed by High Court on 25 January 2022 set aside; sentence of one day imprisonment imposed by sessions court restored.

Reported by Dzulqarnain Ab Fatar